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Jamaica, NY

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLAS ROLL-OFF CORP.  
Employer

and

Case 29-RC-114120

LOCAL 175, UNITED PLANT &  
PRODUCTION WORKERS, INTERNATIONAL  
UNION OF JOURNEYMEN AND ALLIED TRADES  
Petitioner

DECISION AND ORDER

The National Labor Relations Board, by a three-member panel, has considered an objection to a rerun election held on September 3, 2014, and the Regional Director's Supplemental Report on Challenges and Objections and Notice of Hearing recommending disposition of it.<sup>1</sup> The election was conducted pursuant to a Decision and Direction of Election.

The Tally of Ballots in the rerun election showed 4 votes for and 7 against the Petitioner, with 19 challenged ballots. The Employer and the Petitioner both filed objections to the election. The Employer challenged two ballots; the Petitioner challenged four ballots; and the Board Agent challenged 13 ballots (cast by voters not listed on the *Excelsior* list furnished by the Employer prior to the election).

*Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). In his Report on Objections and

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<sup>1</sup> Upon a petition filed on September 25, 2013, the initial election in this case was held on November 20, 2013. The Tally of Ballots showed 13 votes for the Petitioner and 15 against, with 3 challenged ballots. On August 6, 2014, the Board adopted the hearing officer's recommendation to sustain one of the Petitioner's objections and set aside the election.

Challenges and Notice of Hearing, issued on October 31, 2014, the Regional Director recommended sustaining one of the challenges made by the Board Agent and one made by the Employer, but overruling two other challenges made by the Board Agent. He also found that it was undisputed that two employees left off the *Excelsior* list were in fact eligible to vote. The Regional Director directed that a hearing be held concerning the Petitioner's Objection Nos. 1 and 2 and recommended overruling its Objection No. 3 and all of the Employer's Objections. On November 25, 2014, in the absence of exceptions, the Board adopted the Regional Director's findings and recommendation.

Between the issuance of the Regional Director's Report and the Board's Order, the parties agreed that six additional voters not listed on the *Excelsior* list were eligible. On November 17, 2014, the Regional Director ordered that nine undisputed ballots (the six voters that the parties agreed were eligible, the two others whom the parties did not dispute from his earlier Report, and an additional voter, challenged by the Petitioner, whom the parties agreed was eligible) be opened and counted. In his Supplemental Report issued the same day, the Regional Director found that the omission of eight voters from the *Excelsior* list established that the voting was not in substantial compliance with the *Excelsior* rule. In doing so, he relied upon the 32% rate of omission from the list and the fact that the number of omitted voters was determinative of the result. He recommended that the Board set aside the election and order a third election should the Petitioner not have received a majority of the ballots cast when the challenged ballots were opened and counted and the revised tally issued. The revised tally of ballots shows 8 votes for and 12 against the Petitioner, with 1 challenged ballot, a number insufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that the election should be set aside and a third election held.<sup>2</sup>

#### ORDER

The proceeding is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C., January 20, 2015.

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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<sup>2</sup> Omission of a significant proportion of eligible voters from the *Excelsior* list warrants a new election. See *Automatic Fire Systems*, 357 NLRB No. 190 (2012) (36% omitted); *Thrifty Auto Parts, Inc.*, 295 NLRB 1118 (1989) (9.5% omitted). An election may also be rerun if the number of omitted voters is determinative or if the omissions are intentional. See *Woodman's Food Markets, Inc.*, 332 NLRB 503, 504 (2000) (the 6.8% omitted names were potentially determinative and employer failed adequately to explain omissions).

Since the revised tally of ballots shows that the Petitioner did not receive a majority of ballots cast in the rerun, we agree with the Regional Director that a third election should be directed.